

No. _____

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In The
Supreme Court of the United States

KIRKWOOD GLASS CO., INC.,

Petitioner,

v.

MISSOURI DIRECTOR OF REVENUE,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Missouri**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has Missouri violated the Commerce Clause and this Court's holding in *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994), and created a conflict with the decision of the Ohio Supreme Court in *American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio 1978), by creating a tax system that requires petitioner, a Missouri resident, to pay a use tax rate on interstate purchases that is greater than the sales tax rate it pays when it orders identical goods from any of more than 500 Missouri taxing jurisdictions?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kirkwood Glass Co., Inc., respectfully requests that the Court grant a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.¹

OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 166 S.W.3d 583 (Mo. banc 2005), and is reproduced in Appendix A (A-1). The unreported opinion of the Missouri Administrative Hearing Commission is reproduced in Appendix B (A-11). The order of the Missouri Supreme Court denying petitioner's Motion for Rehearing is reproduced in Appendix C (A-34).

JURISDICTION

The opinion and judgment of the Supreme Court of Missouri en banc were filed on June 21, 2005. Petitioner's timely Motion for Rehearing was overruled on August 2, 2005. Jurisdiction of this Court is founded on 28 U.S.C. § 1257(a).

¹ Petitioner is a privately-held corporation with no parent or publicly-held company owning any of its stock.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution provides: "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states."

The Missouri statutory provisions involved in this case are reproduced in Appendix D (A-36).

STATEMENT OF THE CASE

Background

In *Associated Industries of Missouri, Inc. ("AIM") v. Lohman*, 511 U.S. 641 (1994), this Court struck down a state-wide Missouri additional use tax under the Commerce Clause. The offending use tax imposed a uniform 1.5% additional lug on out-of-state transactions (on top of the basic 4.225% use tax), thus creating a state-wide use tax on interstate purchases of 5.725%. The state-wide sales tax, however, was only 4.225%, and although local taxing districts were authorized to adopt an additional local sales tax, many had not done so. As a result, in many areas of the state, a resident purchasing an item from an in-state merchant would be taxed at a lesser rate than his neighbor who bought the identical item through the mail from a vendor in another state.

In an opinion for the unanimous Court, Justice Thomas held the Missouri use tax scheme invalid under the Commerce Clause because it violated "the fundamental command of the Clause . . . that 'a State may not tax a transaction or incident more heavily when it crosses state

lines than when it occurs entirely within the State.’” *Id.* at 647, quoting *Quilley v. Hardesty, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984). The *Quilley* case was held to impermissibly discriminate in those localities where the local sales tax was less than 1.5%, and the case was remanded for a determination of the remedy.

On remand, the Missouri Supreme Court ruled that the unconstitutional aspects of the use tax law were not severable and rendered the state’s taxing system a patchwork scheme in which some jurisdictions had a use tax and some did not. Because this was the antithesis of the legislature’s intent, the entire additional use tax was voided. *AIM v. Director of Revenue*, 918 S.W.2d 780, 785 (Mo. banc 1996).

The Current Use Tax Scheme

In 1996, the Missouri General Assembly attempted to deal with the aftermath of the *AIM* litigation by enacting § 144.757 R.S.Mo., the relevant portion of which provides:

“Any county or municipality . . . may, by a majority vote of its governing body, impose a local use tax if a local sales tax is imposed as defined in Section 32.085 R.S.Mo., at a rate equal to the rate of the local sales tax in effect in such county or municipality [subject to voter approval].”²

² The entire relevant text of the statute is set forth in Appendix D, *post*, together with other applicable statutory provisions. Unless otherwise indicated, all statutory references in this petition are to the Missouri Revised Statutes (2000).

Pursuant to this legislation, some counties and municipalities have enacted local use taxes and some have not. Where enacted, the amount of the local use tax is required to be equal to the local sales tax imposed by that jurisdiction, but the rate for sales and use taxes in one county or municipality may vary significantly from the rates prevailing in other areas of the state. Customers pay the sales tax of the jurisdiction where the vendor is located, regardless of where the item is delivered. Section 32.087.12(1). But the use tax rate on purchases from out-of-state vendors is the rate in effect where the goods come to rest, typically the place of delivery. Section 144.610.1. Sales within Missouri are exempt from any use tax. Sections 144.615(2) and 144.759.4

The resulting variations between the local sales tax rates and the local use tax rates in various parts of the state result in widespread discrimination against interstate sales into Missouri. According to the parties' stipulation, there are 137 taxing jurisdictions in the state (out of 1,669) where the total sales tax rate is 4.725% (4.225% state and .5% local) – the lowest sales tax rate in the state. There are 361 jurisdictions where the use tax rate is more than 4.725% (Stip. Ex. A). Thus, a customer in any one of those 361 areas can save tax simply by ordering goods from one of the 137 Missouri jurisdictions having the lower sales tax rate, rather than buying from an out-of-state vendor. And sellers from other states face a competitive disadvantage when dealing with potential customers in those high use-tax venues.

The Basis for Petitioner's Claim

Petitioner Kirkwood Glass is in the glass sales and repair business and is located in Kirkwood, Missouri. In

the course of its business, petitioner purchases tangible personal property from vendors located in (a) Kirkwood, (b) other Missouri jurisdictions, and (c) other states. On purchases from vendors in Williamsburg, Missouri, petitioner pays a sales tax of 4.725% (4.225% state and .5% local) (Stip. ¶ 7). Because it pays a Missouri sales tax on those purchases, it is exempt from any use taxes. When petitioner buys goods from outside Missouri that are shipped to its business location in Kirkwood, it is responsible for a use tax of 5.475%, consisting of the state's 4.225% use tax and the local use tax of 1.25% (Stip. ¶ 8).

During 2002, the 5.475% use tax paid by petitioner on out-of-state purchases exceeded the sales tax rate in about 523 Missouri taxing jurisdictions (Stip. Ex. A).

Proceedings Below

In January 2003, petitioner filed an application for use tax refund with the Missouri Department of Revenue, seeking a refund of \$6,371, which represented the 1.25% local use tax paid on its purchases of \$509,718 during the prior three years (Stip. Ex. 4). The application was accompanied by a memorandum asserting that the state statutes authorizing the local use taxes violate the Commerce Clause under this Court's decisions in *AIM* and *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Petitioner also pointed out that the Ohio Supreme Court had struck down a virtually identical use-tax scheme in *American Modulares*

Corp. v. Lindley, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978) (L.F. 105-07).³

Following the denial of its claim by the Department of Revenue, petitioner filed its Complaint with the Administrative Hearing Commission ("AHC"), which had jurisdiction under § 621.050. Again petitioner sought refund of the local use taxes it had paid on the basis of a violation of the Commerce Clause (L.F. 1). After the facts were fully stipulated and the case was briefed, the AHC filed its decision on September 24, 2004. Petitioner's claim for refund was denied on the grounds that "this Commission does not have jurisdiction to declare the local use tax statutes unconstitutional" (A-11).

The Missouri Supreme Court affirmed the AHC and rejected petitioner's refund claim in a unanimous opinion filed on June 21, 2005, and reported at 166 S.W.3d 583 (Mo. banc 2005) (A-1). The court held that even though use taxes in many areas were higher than sales taxes in many other parts of the state, "[a] court is not required to compare purchases in one jurisdiction with deliveries to another jurisdiction in determining the constitutionality of a use tax" (A-2). The court noted that petitioner was challenging the state statutes that authorized this pattern of divergent sales and use tax rates, but held that the proper focus instead should be on the individual taxing jurisdictions (A-8). As long as each such jurisdiction does not impose a use tax that exceeds its own sales tax, said the court, it is constitutionally irrelevant that a resident of

³ "L.F." refers to the Legal File filed in the Missouri Supreme Court.

that jurisdiction pays a lesser sales tax if he orders the goods from a neighboring Missouri county (A-9-10).

Petitioner filed a timely Motion for Rehearing, pointing out, *inter alia*, that the court had not addressed the squarely conflicting Ohio case of *American Modulares*, which had been cited in the original refund application and argued extensively in petitioner's briefs. That motion was denied without comment on August 2, 2005 (A-34).

REASONS FOR GRANTING THE PETITION

THE MISSOURI USE TAX SCHEME DISCRIMINATES AGAINST OUT-OF-STATE TRANSACTIONS AND THEREFORE VIOLATES THE COMMERCE CLAUSE.

Missouri has ignored the lesson of *AIM* and has once again run afoul of the Commerce Clause. The conjunction of three factors makes Missouri's use tax scheme unconstitutionally discriminatory: First, many of Missouri's counties and municipalities impose sales taxes at a rate lower than the use taxes charged in other locales in the state. Second, under § 32.087.12(1), the sales tax rate is determined by the location of the vendor, regardless of where the buyer takes delivery, while the use tax is based on the rate at the place the goods come to rest – usually the place of delivery. Third, §§ 144.615(2) and 144.759.4 grant a complete exemption from use tax if a purchase is subject to Missouri sales tax, regardless of the rate of that sales tax, while under § 144.615(5) an out-of-state purchaser is only entitled to a credit against use tax for the amount of any sales tax paid to another state. As a consequence, interstate sales are